IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 12

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,

Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I. SINCE THE SEVENTH AMENDMENT LIMITS APPELLATE REVIEW OF A JURY HOLDING TO THE SCOPE OF REVIEW UNDER COMMON LAW, THE COURT OF APPEALS HAD NO POWER TO ENTER JUDGMENT FOR ONE PARTY DESPITE A JURY VERDICT AND JUDGMENT FOR THE OTHER.

The Judicial Code of 1948 (62 Stat. 963, 28 U.S.C. 2106) does not enlarge or shrink petitioner's rights under the Seventh Amendment to the United States Constitution.

Insofar as applicable here, 28 U.S.C. 2106 states that an appellate court may reverse or set aside a judgment of a trial court, remanding with directions to enter judgment. The Seventh Amendment says that Sandra Lee Neely is entitled to a trial by a jury in a federal court and that no fact tried to that jury shall thereafter be dealt with by any court other than according to the common law.

Assuming for the purpose of this portion of the argument that the plaintiff's case was totally deficient in proof of proximate cause and negligence (a concession which the petitioner has not made and will not make), nevertheless, we still must explore the common law in order to determine whether *appellate* courts operating from a cold transcript engaged in the practice of entering judgment for one party despite a jury verdict for the other.

Crim v. Handley, 94 U.S. 652, 657 says that the appellate courts had no such power. The respondent brushes *Crim* aside and indulges the assumption that *Baltimore & C. Line v. Redman*, 295 U.S. 654, settles the issue. A chronological review of the cases in point thus becomes necessary. Fervently, we hope that the following analysis of the state of the law will lead to a definitive decision for the guidance of the bench and bar.

Slocum v. New York Life Ins. Co., 228 U.S. 364, was a controversy arising out of a life insurance policy. At the close of all the evidence, the company requested a directed verdict which request the trial judge denied. A verdict was returned for the plaintiff. The company moved for judgment n.o.v. which motion was also denied. From judgment for the plaintiff, the defendant insurance carrier appealed, assigning as error the refusal of the trial court to direct a verdict and to grant judgment n.o.v. The appellate court reversed with directions to sustain the motion for judgment n.o.v. since, as a matter of law, there was no insur-

ance contract. This Court granted certiorari to decide whether or not the Court of Appeals erred in reversing the judgment and whether, if it did not err in so doing, it should have awarded a new trial instead of terminating the litigation by direction to enter judgment n.o.v. The Supreme Court observed that:

> ". . . when, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party." *supra* at 369.

The Supreme Court agreed with the opinion of the Court of Appeals that there was no basis in the evidence for a plaintiff's verdict, and then turned to the law of Pennsylvania, the state from which the controversy arose. The Court observed that state practice provided that where a trial court has ruled upon a motion for judgment *non obstante veredicto*, the losing party may appeal, and the reviewing court shall then enter such judgment as the evidence may require. The Supreme Court agreed with the Court of Appeals that it had the power under Pennsylvania procedure to review the denial of the motion for judgment n.o.v., but determined that direction of judgment by the Court of Appeals rather than the ordering of a new trial, was a violation of the Seventh Amendment. The Supreme Court modified the judgment by eliminating the direction to enter judgment and substituting a direction for new trial.

Soon after *Slocum* the Court decided *Young v. Central R.R. of N.J.*, 232 U.S. 602. There the administratrix of the estate of Young sued to recover under the Federal Employers Liability Act for the death of her husband. Again,

the Supreme Court conceded the accuracy of the Circuit Court's analysis that there was insufficient showing of negligence to submit the case to a jury. But the Court modified the judgment by eliminating the direction to enter judgment for the defendant n.o.v. and substituted a direction for a new trial. The only precedent cited by the Court was *Slocum*.

Then came *Baltimore & C. Line v. Redman*, 295 U.S. 654, wherein under somewhat similar circumstances, the Court modified a judgment of a Court of Appeals by substituting a direction for a judgment of dismissal in place of a direction for a new trial. On its face, the *Redman* decision would appear to be a formidable barrier to the relief sought by Sandra Lee Neely. The respondent relies heavily upon this decision in its answer brief. But when the case is held to the light, it appears to have flaws in its fabric.

For example, the Court cites *Chinoweth v. Haskell*, 3 Pet. 92, as a case wherein a verdict for the plaintiff was reversed and judgment directed for the defendant in this Court (295 U.S. at 661). However, on reading the case and the comment thereon which appears on page 391 of *Slocum*, we discover that in *Chinoweth* there was a demurrer thus reducing the question to one of law alone. If the case were not distinguishable on that basis, how else could two cases such as *Chinoweth* and *Parsons v. Bedford*, 3 Pet. 433, occupy the same volume of the Reports? Nor is *Chinoweth* a part of the common law since it was decided forty-one years after 1791. Additionally, it does not appear that the prohibition of the Seventh Amendment was considered in that opinion. The Court in *Redman* observed:

> "At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where

> he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other; or making other essential adjustments." 295 U.S. at 659.

We have no quarrel with this as an abstract statement and, as such, it is unquestionably supported by the cases footnoted at 295 U.S. 659. But this distinction is of paramount importance: Nothing either in the quotation set forth above, or in the English cases cited in the footnote, indicates that appellate courts were in any way involved, since the procedure discussed pertained only to the trial court sitting *en banc*.

We examined the English common law decisions in order to try to find a single case wherein any appellate court took it upon itself from an examination of a cold record, to render a decision depriving a verdict-winner of the fruits of the verdict and terminating the litigation or ordering it terminated. We were unable to find any such case in the common law. We did find cases like those cited in the *Redman* footnote where verdicts were returned on circuit with the reservation of difficult questions of law which that judge then brought to his brother judges *en banc* at Westminster so that he might have their assistance in solving such questions. At the very least, the trial judge was a participant, sitting with his peers so that the court *en banc* had the advantage of at least the personal contact and observations of one judge who had presided in the courtroom while the trial progressed on its merits. It appears that this was a voluntary submission of the reserved question and it was as though the judge with a knotty problem of law were requesting his fellows to sit with him in chambers and to assist him. This procedure is described in Radcliffe and Cross, The English Legal System (London, 1937), pp. 170-171 and in Kiralfy's The English Legal System (London, 3rd ed. 1960), p. 150.

The Supreme Court cited *Slocum* as authority in *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, and rejected *Redman* as

inapplicable because of a procedural difference. Therein the Court said flatly:

> "The Circuit Court of Appeals had jurisdiction to reverse and remand for new trials but was without power, consistently with the Seventh Amendment, to direct the trial court to give judgments for plaintiff." 301 U.S. at 394.

We believe we detect in *Kennedy* an uneasiness with the holding in *Redman* and a reluctance to allow appellate termination of jury cases by reversing and dismissing on the record. This whisper of doubt rises to a crescendo in later cases as we shall see.

In *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, this Court had occasion to construe Rule 50(b) of the then new Federal Rules of Civil Procedure and used language which would appear on its face to be directly contradictory to the above quotation from *Kennedy*. In *Duncan* the Court said:

> "The appellate court may reverse the former action *and itself enter judgment n.o.v.* or it may reverse and remand for a new trial for errors of law." 311 U.S. at 254, emphasis supplied.

However, it will be noted that in *Duncan*, this Court was not construing the application of the Seventh Amendment to the procedure under Rule 50. The question which the Court decided was whether or not the granting of a verdict-loser's motion for judgment n.o.v. by the trial court eliminated the necessity for that court to also rule upon the motion for new trial filed by the same losing party. There was no occasion to reach the fundamental constitutional issue involved in the instant appeal.

The oft-cited dissent by three justices in *Galloway v. United States*, 319 U.S. 372, is of great revelance here. Therein it was stated:

> "In 1830, this Court said: 'The only modes known to the common law to re-examine such facts, are

the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings.' *Parsons v. Bedford, supra*, at 448. That retrial by a new jury rather than factual re-evaluation by a court is a constitutional right of genuine value was restated as recently as *Slocum v. New York Life Insurance Co.*, 228 U.S. 364." 319 U.S. at 400.

Although that dissent was written twenty-seven years ago, we believe that the instant submission represents the first time this Court has had an opportunity to resolve the apparent conflict between *Slocum* and *Redman* and to delineate the extent to which an appelate court can go in disposition of a controversy brought before it on review.

In summary, the petitioner states her belief that the footnote cases cited in *Redman* in support of a supposed common law power of the appellate court do not, in fact, establish that the procedure which *Redman* condoned ever did exist in the common law. If the foundations of *Redman* are accurately challenged, then the guidance of this Court is needed so that appellate courts and those lawyers who practice before them will know that *Crim, Parsons, Slocum,* and *Kennedy* rather than *Redman* delineate the scope of appellate power.

The record in the trial court in this case is replete with testimony of witnesses describing photographs and the blackboard drawing with such phrases as "this area", "this side", "this point", etc. These explanatory phrases were accompanied by gestures which do not appear in the appellate record. No doubt, some meaning also must have been conveyed to the triers of the fact by means of vocal pauses and emphasis. In order to reach a conclusion that "the facts show a total lack of competent evidence to connect the fall by Neely with the alleged negligence on Eby's part . . ." (R. 94), it was necessary for the appellate court

to canvass *all* of the evidence. Considering the complexity of the facts, can this be done by one who did not attend the trial?

Another problem with review of a cold record arises from the danger of misunderstanding the testimony, *Cone v. West Virginia Paper Co.*, 330 U.S. 212. Was the court of Appeals correct when it declared:

> "Blanchard also testified that when he left the area it was well lighted." (R. 90)

The testimony from Mr. Blanchard was actually quite different:

> "Q. This area was well lighted at the time, was it not?
>
> "A. It had the permanent silo lights, plus some extension cords.
>
> "Q. Well, it wasn't dark in there?
>
> "A. Well, it isn't as well lighted as this is right here." (R. 39)

All one can conclude fairly from this testimony is that the area in which Neely's fall occurred was not as well lighted as the courtroom in which the case was tried.

There are other apparent discrepancies between the trial record and the recounting of the facts as they appear in the decision of the Court of Appeals. We are told the following:

> "The day silo captain, or millwright foreman, Blanchard, discovered that it was too large and interfered with the measurements that had to be taken from a drive locking mechanism *at the bottom of the silo* and the counterweight locking mechanism located about 6 feet below the top of the silo." (R. 90) emphasis supplied.

To be precise, the testimony was that the measurements were to be made from the locking device down to

the locking pin centered on the counterweight (R. 15, 56). The distance involved in the measurement was only about six feet (R. 24, 32).

Again, common sense may very well dictate that the missile itself had not been installed in the crib (R. 90); but this fact, if it be a fact, is something that the petitioner has been unable to locate in the printed record.

The petitioner makes these observations only to support her contention that an appellate court, working from a cold record, cannot possibly have as complete an understanding of the evidence as would the judge and jury who sat in the courtroom for three days observing the witnesses, observing their gestures, listening to their voices as they punctuated testimony by vocal inflection—these are all brush strokes which blend into the completed painting which we call "a trial".

Assuming for the purpose of this argument that the interpretations of the evidence made by the Court of Appeals in this case are all absolutely accurate, or that any errors are without substance; nevertheless, a decision that it is proper for the Court of Appeals to engage in this kind of fact-review might very well result in injustice in some other case.

This must have been one of the compelling reasons why the Seventh Amendment insisted upon control and limitation of appellate review of facts tried to juries.

II. CAN WE GLEAN FROM THE POST-WAR DECISIONS INTERPRETING RULE 50, A CONSISTENCY OF ATTITUDE TOWARD TERMINATION OF LITIGATION BY JUDGMENT AT THE APPELLATE STAGE AGAINST THE JURY-VERDICT-WINNER BELOW?

Cone v. West Virginia Paper Co., 330 U.S. 212, dealt with the limited question of the power of an appellate court under Rule 50(b) to reverse and dismiss under circumstances where the verdict-loser had failed to move for judg-

ment n.o.v. in the trial court. In an unanimous opinion, this Court reversed the holding of the Court of Appeals. The Court noted that such a procedure would effectively foreclose the verdict-winner (the plaintiff) from obtaining a new trial in order that he might repair any evidentiary gaps which might have existed in his case. The Court did not discuss any constitutional issue in its decision.

In *Globe Liquor v. San Roman*, 332 U.S. 571, the Court extended the rationale of the *Cone case* to a situation wherein both sides had moved for directed verdicts and the Court had granted one. On appeal, after the Circuit Court had reversed and remanded with instructions to enter judgment for the verdict-loser below, the Supreme Court quoted the following language from *Cone*:

> " 'Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge *who saw and heard the witnesses and has the feel of the case which no appellate* printed transcript can impart.' " 332 U.S. at 574, emphasis supplied.

Agreeing with that much of the Circuit Court's opinion as dictated a reversal, this Court, nevertheless, modified the judgment and ordered a new trial.

Weade v. Dichmann Co., 337 U.S. 801, was a tort action brought by passengers against an agent employed by the United States to manage a ship owned by the government. The plaintiffs' theory was that the defendant owed the highest degree of care as a common carrier. On this theory a verdict for the plaintiffs was returned. The defendant failed to except to the instructions as to quantum of care. The trial court denied the verdict-loser's motion for judgment n.o.v. and an appeal followed. The Court of Appeals, determining that the defendant did not owe the duty of care as described in the instructions and upon which the plaintiffs' case rested, reversed with instructions to enter judgment for the defendant. The Supreme Court, agreeing

that the defendant was not a common carrier, nevertheless, ordered the direction modified so as to permit the plaintiffs to proceed on another theory.

Johnson v. New York, N.H. & H.R. Co., 344 U.S. 48 was a Jones Act case. After the close of the evidence, the defendant moved to dismiss and for a directed verdict. The trial judge reserved decision and submitted the issue to the jury which found for the plaintiff. Judgment was entered and the defendant moved to set aside the judgment, but it did not specifically move for judgment n.o.v. From a denial of the defendant's motions it appealed. The Court of Appeals held that the motion for a directed verdict should have been granted and reversed the judgment. The petitioner, verdict-winner below, appealed to the United States Supreme Court contending that since the company had failed to move for judgment n.o.v., neither the trial court nor the appellate court had the power to enter such a judgment. In a decision which analyzes most of the cases described in this brief, the Court held that the company was entitled to no more than a new trial. The case was remanded for further proceedings consistent with this holding.

Of particular interest is the following comment:

> "Rule 50(b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts. State procedure was no longer to control federal courts as it had in the *Redman* and *Kennedy* cases." 344 U.S. at 52.

The four post-war decisions which we have just discussed indicate a consistent pattern of reluctance on the part of the Supreme Court to permit the Courts of Appeals to terminate cases at the appellate stage by judgments against the verdict-winners.

In *Cone, Globe Liquor* and *Weade* the Court did not mention the Seventh Amendment but concentrated instead

on Rule 50. In *Johnson* there was reference to the Seventh Amendment only in passing as the Court described the holdings in *Slocum* and *Redman*.

In 1963, Rule 50 was amended. As to section (d) of the Rule as it now stands, the advisory committee tells us:

> "Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice." Notes of Advisory Committee on Rules, 28 U.S.C.A. Rule 50, (1966 Pocket Part), p. 220.

It would appear that the change in Rule 50 resulted, at least in part, from the desire of the Court to reduce the uncertainties of appellate procedure which produced the decisions described in this section of our brief.

In our own case, for the first time since the *Galloway* dissent, we find the judicial microscope turned directly upon the relationship of procedural Rule 50 to the Bill of Rights.

III. UNDER THE NEW RULE 50(d) WHEN MUST THE VERDICT-WINNER ASSERT GROUNDS WHICH WOULD ENTITLE HIM TO A NEW TRIAL?

The petitioner, Sandra Lee Neely, received a verdict and judgment in her favor in the trial court which the judge refused to set aside. She received this verdict despite the fact that the court refused to allow two of her witnesses to testify as experts on the sufficiency of the scaffolding which Eby had built (R. 27-29, 59-60, 77). Even if there were no Rule 50(d), the holdings of *Grim, Slocum, Young, Kennedy, Duncan, Cone, Globe Liquor, Weade* and *Johnson* would dictate that the petitioner should be given a post-appellate-decision chance to keep her claim alive.

The respondent would interpret the new Rule 50(d) to restrict rather than to protect and expand the right to call attention to errors prejudicial to the verdict-winner. Eby's interpretation would require that the verdict-winner file a counter-motion for a new trial, detailing errors committed against his interest, even though he has won a verdict. Such a motion is unheard of and if that is what the Rule means then post-judgment practice has seen a most drastic change.

Obviously, the Rule is intended to assist the verdict-winner in protecting his rights and not losing them. Certainly he should not be required to plant judicial doubt upon the verdict by reciting to the Court other errors than those to which the loser calls attention. Nor do we believe that the framers of the new Rule intended to increase the burden of bench and bar by adding new and additional research, new motions and briefs to the burden of review when such research, motions and briefs would be entirely unnecessary if the rulings of the trial court were ultimately affirmed.

We believe that it is unnecessary under the new Rule 50(d) for the verdict-winner to assert grounds entitling him to a new trial until the appellate court should decide as a matter of law that he was not entitled to a verdict.

It becomes almost self-evident that the above-described procedure would be the most desirable and fair one, when we consider that if the trial judge were to set aside the verdict and to grant judgment n.o.v. when the motion first came before him, then the verdict-winner, at that stage, would have the right to file a motion for a new trial alleging error prejudicial to him. Such a procedure is traditional and unquestioned. Why then, should the verdict-winner find himself in a less protected position if the trial judge has denied the motion for judgment n.o.v. than if he has granted it?

It is pertinent at this point to comment briefly upon Rule 50(c). At first blush it might appear that the Court of Appeals has the power under this Rule to substitute its

judgment for that of the jury and to terminate the proceedings by orders entered at the appellate level, thus violating the Seventh Amendment as your petitioner interprets it. However, Rule 50(c) is only applicable after a judgment n.o.v. has been granted by the trial judge. It can never operate to deny to a verdict-winner the fruits of his verdict and thus end the lawsuit. The appellate court can terminate the litigation only by reversing the decision on the motion for judgment n.o.v. and refusing to uphold the conditional grant by the trial judge of a new trial to the verdict-loser. The effect of such procedure is to reinstate the jury verdict. Therefore, there is no violation of the Seventh Amendment.

CONCLUSION

Succinctly stated, the petitioner's position is as follows:

1. The verdict and judgment of the trial judge should be reinstated, because there is sufficient evidence to support it. (The petitioner has not re-argued this point in her reply brief, since she feels that it was adequately presented in her opening brief.)

2. Whether or not the Court of Appeals was correct in finding from the cold record that there was insufficient evidence to support the verdict, this Court should modify the judgment of the appellate court to require a remand for a new trial or to permit the submission of a new trial motion in the trial court by the petitioner.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and that the verdict of the jury and the judgment of the

trial court be reinstated or for such other and further relief in the alternative as has been suggested herein.

Respectfully submitted,

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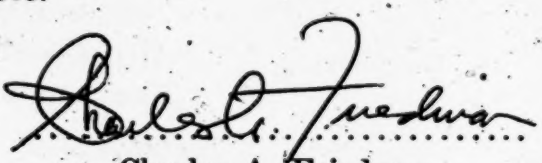
PROOF OF SERVICE

I, Charles A. Friedman, one of the attorneys for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 11th day of January, 1967, I served a copy of the foregoing brief of the Petitioner on John C. Mott, Anthony F. Zarlengo, and Joseph S. McCarthy, attorneys for respondent, by mailing copies in duly addressed envelopes with proper postage prepaid, to John C. Mott, Esq., 1020 American National Bank Building, Denver, Colorado, 80202; Anthony F. Zarlengo, Esq., 595 Capitol Life Center, Denver, Colorado, 80203; and Joseph S. McCarthy, Esq., 745 Washington Building, Washington, D. C. 20005.



Charles A. Friedman